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IN THE
Supreme Court of the United States

Supreme Court, U. S.
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October Term, 1975
No. 75-1754

PANDOL & SONS, a California partnership; JASMINE
VINEYARDS, INC., a California corporation,

Appellants,

vs.

AGRICULTURAL LABOR RELATIONS BOARD,

Appellee.

**APPELLANTS' BRIEF IN OPPOSITION
TO MOTION TO DISMISS.**

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This Brief is filed pursuant to Rule 16(4) of this Court.

The Agricultural Labor Relations Board's Motion To Dismiss and Brief in opposition to our Jurisdictional Statement raises much to reply to. We will not, however, quarrel with the ALRB at every turn;¹ rather, our

¹In passing, we would merely note several of the more egregious distortions and misrepresentations by the ALRB in its Brief. For example, the ALRB asserts (Brief, pp. 10-11) that the access regulation was promulgated partly in response to the view of law enforcement officials. In fact, the testimony of these officials was against permitting access. Thus, Rod Blonien, the Executive Director of the California Peace Officers Association, testified before the Board:

"BOARD MEMBER JOHNSEN: But you feel there would be the least potential strife if we adopted no rule in the access area except at maybe employee houses?

(This footnote is continued on next page)

task is to inform this Court why probable jurisdiction should be noted. In this respect, there can be little doubt that this case presents a substantial federal question. Indeed, of the twelve Judges who have reviewed the access regulation, all have concluded that the issues raised are of significant public importance, and all, but the four-member majority of the California Supreme Court, have found the regulation constitutionally infirm.

1. The Substantial Departure From Precedents of This Court.

The decision of the California Supreme Court upholding the access regulation is a clear departure from the numerous cases decided by this Court on the issue of the right of access by nonemployee union organizers to an employer's private property. The ALRB's argument that these cases do not set forth a constitutional limitation is clearly erroneous. The right to property is not a statutory command of the NLRA, but is embedded in the Constitution. As this Court noted in *Central Hardware Co. v. NLRB*, 407 U.S. 539,

"MR. BLONIEN: That is the consensus from the Sheriffs from the agricultural counties that will be affected by the regulations." (Public Hearings on Access Regulation, August 28, 1976, at A-66.)

Similarly, the Board argues that agricultural workers have been historically excluded from coverage of the National Labor Relations Act, as Amended, 29 U.S.C. § 141, *et seq.*, "because Congress recognized that their employment situation was so different from that of industrial workers. . . ." (at 29). In fact, the agricultural exclusion is generally explained as a concession by supporters of the NLRA to obtain the votes of representatives from the farm states, not because of any recognized differences in the nature of employment. *See, e.g., Lewin, Representatives Of Their Own Choosing*, 1 INDUS. REL. L. J. 55, n.2 (1976).

547 (1972), unrestricted access to an employer's private property by union representatives "would . . . constitute an unwarranted infringement of long-settled rights of property protected by the Fifth and Fourteenth Amendments."

While the ALRB claims to recognize the holding of this Court that there must necessarily be an accommodation between organizational rights and property rights "with as little destruction of one as is consistent with the maintenance of the other," it nowhere explains how the access regulation, which allows nonemployee union organizers an absolute right of entry onto an employer's premises even though alternative means of communication with employees exists, meets this accommodation test. Thus, as applied to Appellants, the access regulation destroys their property rights without enhancing a union's ability to contact their workers.

In arguing that this accommodation may be made by general regulation, rather than case-by-case analysis, the Board relies on this Court's recent decision in *Scott Hudgens v. NLRB*, U.S., 96 S.Ct. 1029 (1976). A careful reading of *Hudgens* makes plain, however, that this case offers no support for the ALRB's approach.

In that case, this Court reversed its decision in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), which apparently laid down a blanket rule permitting union picketing of shopping centers. This Court made clear in *Hudgens* that no such blanket rule was permissible,

but rather the accommodation required by both *Central Hardware* and *Babcock & Wilcox* required consideration of the rights being asserted by both parties—the employees' Section 7 rights and the employer's property rights. This Court noted, 96 S.Ct. at 1037-38:

"Both *Central Hardware* and *Babcock & Wilcox* involved organizational activity carried on by non-employees on the employers' property. The context of the § 7 activity in the present case was different in several respects which may or may not be relevant in striking the proper balance. First, it involved lawful economic strike activity rather than organizational activity. . . . Second, the § 7 activity here was carried on by Butler's employees (albeit not employees of its shopping center store), not by outsiders. . . . Third, the property interests impinged upon in this case were not those of the employer against whom the § 7 activity was directed, but of another.

"The *Babcock & Wilcox* opinion established the basic objective under the Act: accommodation of § 7 rights and private property rights 'with as little destruction of one as is consistent with the maintenance of the other.' The locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context. In each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance."² (Citations and footnotes omitted.)

²While the NLRB has the primary responsibility for making the initial accommodation, in all three access cases decided

It is clear from a reading of *Hudgens* that "generic situation," as used in that decision, does not mean, as the ALRB argues, that it may formulate a rule of access applicable to every agricultural employer in the state; rather, that it requires a balancing in each case of the various rights being asserted. This is made clear not only from the context of the Court's statement but from the dissent, as well. Thus, as Mr. Justice Marshall pointed out in his dissent, the *Babcock & Wilcox* analysis requires identification of the audience intended to be reached, the employer's property rights, and the alternative means of communication available. As he noted, 96 S.Ct. at 1943:

"Thus the general standard that emerges from *Babcock & Wilcox* is the ready availability of reasonably effective alternative means of communication with the intended audience.

"In *Babcock & Wilcox* itself, the intended audience was the employees of a particular employer, a limited identifiable group; and it was thought that such an audience could be reached effectively by means other than entrance onto the employer's property—for example, personal contact at the employees' living quarters, which were 'in reasonable reach.' "

In the cases of Appellants, the intended audiences are their respective employees, the same audiences as in *Babcock & Wilcox*, and it is undisputed that in reaching Appellants' employees, unions have effective alternative means of communication.³ Moreover, the

by this Court, the Board's decision was reversed because it had improperly accommodated employer property rights.

³Temporary Restraining Order issued by United States District Court for the Eastern District, at Fresno, ¶ 7, reprinted in Jurisdictional Statement, Appendix D at 62.

property rights asserted by Appellants are their own and in each case their land is posted against trespass.

It is clear, then, that all of the cases of this Court dealing with the issue of access by nonemployee union representatives to an employer's private property require a case-by-case analysis as to the availability of alternative means of communication. This also was made plain by this Court in *NLRB v. United Steelworkers of America*, 357 U.S. 357 (1958). That case dealt with the enforcement by an employer of a no-solicitation rule, while at the same time engaging in anti-union propaganda on its premises. The Court emphasized the availability of alternative means of communications:

"If, by virtue of the location of the plant and of the facilities and resources available to the union, the opportunities for effectively reaching the employees with a pro-union message, in spite of a no-solicitation rule, are at least as great as the employer's ability to promote the legally authorized expression of his anti-union views, there is no basis for invalidating these 'otherwise valid' rules. The Board, in determining whether or not the enforcement of such a rule in the circumstances of an individual case is an unfair labor practice, may find relevant alternative channels available for communications on the right to organize. When this important issue is not even raised before the Board and no evidence bearing on it adduced, the concrete basis for appraising the significance of the employer's conduct is wanting.

* * *

"No attempt was made in either of these cases to make a showing that the no-solicitation rules

truly diminished the ability of the labor organizations involved to carry their message to the employees. Just as that is a vital consideration in determining the validity of a no-solicitation rule, . . . [i]t is highly relevant in determining whether a valid rule has been fairly applied. Of course the rules had the effect of closing off one channel of communication; but the Taft-Hartley Act does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communication simply because the employer is using it.” *Id.* at 363-64. (Citations omitted.)

Finally, the ALRB argues that this Court has never reached the issue and, accordingly, it has within its discretion the power to decide the issue of access by general regulation rather than by case-by-case. In fact, it was precisely this issue that was met head on by this Court in *Babcock & Wilcox*. The NLRB’s decision in *The Babcock & Wilcox Co.*, 109 N.L.R.B. 485 (1954), held that even though other means of communicating with employees existed, nonemployee union organizers had an absolute right to distribute union literature in nonworking areas of an employer’s property, such as parking lots and along walkways. In reversing the NLRB’s decision, this Court made clear in *Babcock & Wilcox* that the availability of alternative means of communications was the touchstone of deciding the issue of access. Where, as here, it is undisputed that effective alternative means of communication existed for unions to contact Appellants’

employees⁴ without access to Appellants' private property, such access cannot be required consistent with the decisions of this Court.

2. Appellants' Property Rights.

The thrust of the ALRB's argument is that the constitutional right of property is peripheral and thereby subject to broad state regulation, citing a series of zoning cases decided by this Court. As was pointed out previously, however, the right of private property is a fundamental right and this right includes the right to exclude uninvited persons from such property:

"[A] private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated" *Adderly v. State of Florida*, 385 U.S. 39, 47 (1966).

Similarly, in *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 570 (1972), this Court noted that:

"Although the accommodations between the values protected by these three amendments [the First, Fifth and Fourteenth] are sometimes necessary, and the courts properly have shown a special solicitude for the guarantees of the First Amendment, this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only."

⁴It is curious that the ALRB seeks to argue that alternative means of communications do not exist (Brief, p. 17, n.6), when in fact this was alleged in the court below, was supported by declarations, and in the California Supreme Court the ALRB took the position that there were no facts in dispute.

Moreover, there is Mr. Justice Black's dissent in *Logan Valley*, which carried the day in *Scott Hudgens*:

"[T]he Constitution recognizes and supports the concept of private ownership of property. The Fifth Amendment provides that '[n]o person shall * * * be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.' This means to me that there is no right to picket on the private premises of another to try to convert the owner or others to the views of the pickets. It also means, I think, that if this Court is going to arrogate to itself the power to act as the Government's agent to take a part of Weis' property to give to the pickets for their use, the Court should also award Weis just compensation for the property taken." 391 U.S. 308, 330 (1968).

These cases make plain that the zoning cases cited by the Board and relied on by the majority of the California Supreme Court are inapposite. As the dissent below noted (Jurisdictional Statement, Appendix A at 51-52):

"When regulations such as zoning are challenged, the constitutional issue raised is the extent to which the government may regulate *a landowner's use* of his own property. The access regulation, on the other hand, presents a very distinct situation. In promulgating such a regulation the government is requiring a property owner to surrender the use of his private property not for public use but *for the use of other private parties*—nonemployee union organizers.

"The distinction is of major significance. In the private access situation we must weigh the

strength of the interest asserted against the infringement on private property rights. The proper judicial function is to balance the competing interests; although the rational relationship test applies in zoning cases, the law of zoning is not a universal solvent in which property rights are dissolved." (Emphasis in original.)

3. The Irrebuttable Presumption.

This case does not deal with statutory benefits created by the state which may make reasonable distinctions as to the recipients, as for example, in *Weinberg v. Salfi*, 422 U.S. 749 (1975), but deals instead with the fundamental constitutional right of property. By requiring access without offering Appellants an opportunity to demonstrate that such access is neither necessary nor required, the access regulation does precisely what the Fifth and Fourteenth Amendments say it cannot do: deprive Appellants of property without due process.

4. The Not-So-Unique Circumstances of This Case.

The ALRB argues that the circumstances of this case are so unique that the issues raised herein do not present a substantial federal question. The ALRB premises this on the purported unique nature of agriculture, and the Agricultural Labor Relations Act, as well as the backdrop of agricultural unionization in California.

The fact is, however, that the circumstances of employment in agriculture are no different than in numerous industries covered under the NLRA. This point was well made by Ogden Fields, then Executive Secretary of the NLRB, who testified as an expert witness

before the House Special Subcommittee on Labor in regard to H.R. 4769, a bill to amend the NLRA to include agriculture. Fields testified:

"The Board has had a wealth of experience in exercising jurisdiction over seasonal and migratory industries. Over many years it has built up in these industries a substantial body of case law and procedural practices that have won the approval and support of the Circuit Courts of Appeal and the Supreme Court. And much of this experience was developed in industries directly and immediately related to agriculture, such as the packing, canning, and food-processing industries.

...

* * *

"The seasonal need for large numbers of temporary employees to handle highly perishable products is not unique to agriculture. Nor is the fact that some employees are migratory. These characteristics exist in fruit and vegetable packing, canning, and freezing, sugar processing, cotton ginning, production of alfalfa meal, fertilizer, potato warehousing, nursery stock warehousing, etc.

"The Board has also gained much experience from other industries where employment is seasonal or of brief duration and the employees migratory or mobile, such as the fishing and construction industries, in addition to a miscellany of non-food seasonal industries, such as toy manufacturing, lawn mowers, recreation, soft drink, gift packing, greeting cards, etc. The Board has decided representation issues and conducted elections successfully in thousands of cases in these industries.

“Accordingly, in my opinion, many of the principles, procedural practices, and techniques in these related or analogous industries would be readily applicable to agricultural employees now excluded from the Act.” *House Special Subcommittee on Labor—Hearings on H.R. 4769 at 148-49 (90th Congress, 1st session) (May 8, 1967).*⁵

Moreover, the unionization of agricultural employees is a national development. Indeed, the labor organization which has been most active in organizing such employees in California, the United Farm Workers, recently merged with the Asociacion de Trabajadores Agricolas, a union of agricultural employees based in Hartford, Connecticut.⁶

Nor are the provisions of the ALRA so unique. Indeed, in some respects the NLRA is even more stringent. For example, while the ALRA permits elections at any time the work force constitutes 50 percent of peak employment (ALRA Sec. 1156.4), elections under the NLRA in seasonal industries must occur only at the approximate peak of employment. *See, e.g., Industrial Forestry Ass'n*, 222 N.L.R.B. No. 60 (1976); *The Gorin Co.*, 148 N.L.R.B. 1499 (1966); *Arena-Norton, Inc.*, 93 N.L.R.B. 375 (1951).

⁵If this Court approves the access regulation, then the NLRB could similarly pass an access regulation either for industry as a whole, or for industries having the purportedly unique characteristics of agriculture.

⁶99 Monthly Labor Review 48 (1976).

Conclusion.

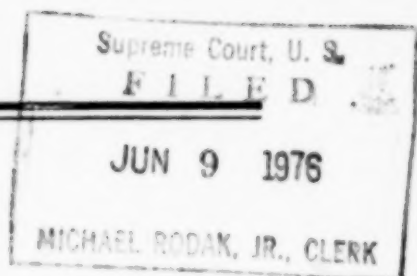
To be sure, as argued by the ALRB, the states are free to experiment with different laws and regulations. They are the laboratories of democracy. In doing so, however, the states are not free to deprive their citizens of their constitutional rights. This Court is the only remaining safeguard against such a deprivation in this case.

Respectfully submitted,

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**AMICUS CURIAE BRIEF OF AMERICAN FARM
BUREAU FEDERATION IN SUPPORT OF
JURISDICTIONAL STATEMENT.**

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**AMICUS CURIAE BRIEF OF AMERICAN FARM
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The American Farm Bureau Federation hereby respectfully submits this *amicus curiae* brief in support of Appellants' jurisdictional statement. Pursuant to Rule 42 of this Court, consent to the filing of this Brief has been obtained from both the Appellants and the Appellee.

INTEREST OF AMICUS CURIAE.

This Amicus Brief is filed by the American Farm Bureau Federation (hereinafter referred to as "The Farm Bureau") 225 Touhy Avenue, Park Ridge, Illinois 60068. The Farm Bureau was organized in 1919 under the "General Not For Profit

Corporation Act" of the State of Illinois for the express purpose of promoting, protecting and representing the business, economic, social, and educational interests of farmers and ranchers in the United States. It is the largest voluntary general farm organization in the world, representing more than two million member families. It has members in all states (except Alaska), and also in Puerto Rico.

The Farm Bureau's interest in this case derives from the effect of the administrative regulation in question upon its membership in the State of California, as well as from the potential effect of this regulation upon its membership throughout the country.

NATURE OF THE CASE.

This case challenges the constitutionality of an administrative regulation of the State of California (hereinafter referred to as the "access regulation")—California Administrative Code, Title 8, Part II, Chapter 9, §§ 20900-20901 (pp. 1051-53). The regulation was promulgated by the California Agricultural Labor Relations Board (ALRB) which is charged with the administration of the California Agricultural Labor Relations Act, California Labor Code, § 1140, *et seq.* (ALRA). The ALRA, which regulates agricultural labor relations, is modeled after the National Labor Relations Act, as amended, 29 U. S. C. § 141, *et seq.*

The access regulation requires that agricultural employers in the State of California grant non-employee union organizers access to their property for the purpose of engaging in organizing their employees. The regulation requires that such access be granted to working areas of an employer's property and it requires that access be granted regardless of whether there are alternative means, less disruptive of the employer's property rights, by which the union organizers could communicate with the employees.

The constitutionality of the access regulation was upheld by a 4-3 decision of the California Supreme Court. Appellants have

appealed that decision to this Court.¹ The Farm Bureau submits that the issues raised by this case present a substantial federal question and, accordingly, has filed this *amicus* brief in support of Appellants' jurisdictional statement requesting this Court to note Probable Jurisdiction.

ARGUMENT IN SUPPORT OF JURISDICTION.

The purpose of the access regulation is to facilitate the efforts of union organizers to engage in organizational activity among agricultural employees. However, in effectuating this purpose, the access regulation substantially intrudes upon the property rights of agricultural employers. This conflict between employee organizational rights and employer property rights is not new to this Court. It has been before this Court on several occasions and this Court has responded by clearly delineating the principles which must be applied in resolving this conflict.

In *NLRB v. Babcock & Wilcox Co.*, 351 U. S. 105 (1956); *Central Hardware Co. v. NLRB*, 407 U. S. 539 (1972) and more recently in *Scott Hudgens v. NLRB*, _____ U. S. _____, 96 S. Ct. 1029 (1976), this Court has held that an accommodation between the rights of private property and employee self-organization was mandated. This line of cases makes clear, however, that an employer need not grant such access to his private property to non-employee union organizers *unless* it could be shown that there were no alternative means of communication available to the union.

The access regulation flies in the face of these principles in that it grants an unqualified right to non-employee union organizers to enter an employer's private property irrespective of the fact that there are alternative means available to the union to communicate with the employer's employees. Effectively, the access regulation does not recognize an employer's rights of

1. A parallel action, *Kubo, et al. v. ALRB*, is also being appealed to this Court and we similarly support the appeal in that action.

private property—even though protected by the Fifth and Fourteenth Amendments to the Constitution—but rather, recognizes only the employee organizational rights.

One of the justifications found for such an absolute right is the purportedly unique nature of agriculture. But, agriculture² is as diverse as American industry. Agriculture includes such diverse activities as the production of horticultural crops, cotton, grains, oil seeds, livestock, forest products, poultry and eggs. It encompasses small farms and large ones; migratory and permanent work forces. All of these provide factually different settings for union organization. Indeed, the facts in the cases of Appellants are undisputed that alternative means exist for union organizers to communicate with their employees outside of Appellants' private property.

But, the access regulation takes no account of these individual circumstances and differences between and among agricultural employers. The right to access is absolute. As such, the regulation suffers the same defect as the NLRB's decision in *Babcock*—it deprives employers of their constitutional right of property without any requisite showing of a need to do so.

Moreover, the access regulation imposes a particularly heavy burden on agricultural employers. It requires access to working areas of an employer's property³ where there is the threat of direct damage to crops being broken, crushed, uprooted or otherwise damaged. Indeed, even disruptive conduct by non-employee union organizers while on an employer's private property is privileged under the access regulation, since it does not serve as a basis for preventing future access.⁴ Thus, the ever-present

2. Under the Agricultural Labor Relations Act, § 1140.4(a) and (b), agriculture is defined to coincide with the Fair Labor Standards Act definition of agriculture, 29 U. S. C. § 203(f).

3. The access to working areas required by the regulation is directly contrary to this Court's decision in *Central Hardware* where it specifically limited access to "prescribed nonworking areas of the employer's premises." 407 U. S. at 545.

4. Under the access regulation (Section 5(e)): "Disruptive conduct by particular organizers shall not be grounds for expelling

(Continued on next page)

hazards of agriculture—such as weather and disease—are now heightened by bureaucratic dictates creating the absolute right to trespass on farms and ranches.

Finally, it should be underscored that the importance of this case is not limited to the agricultural setting of California. Rather, it raises issues of nationwide importance. At present, several states have passed comprehensive legislation dealing with agricultural labor relations.⁵ Other states have comprehensive labor relations statutes which include agriculture.⁶ Still others, have general organizing statutes.⁷ The issues raised by this case then are ones which affect agricultural employers throughout the country. For if the access regulation can withstand constitutional scrutiny in this case—if California can force farmers to grant access to their private property to non-employee union organizers who have no demonstrated need to be there—then similar regulations could be enacted anywhere.

(Continued from preceding page)

organizers not engaged in such conduct, nor for preventing future access."

5. These states are Arizona, Idaho, Kansas and Oregon. *Ariz. Rev. Stat.*, § 23-1381-1395; *Idaho Code*, § 22-4101 to 4114; *Kan. Stat. Ann.*, § 44-818 to 830; *Ore. Rev. Stat.*, § 662.805-825.

6. These states are Hawaii, New Jersey, Puerto Rico and Wisconsin. *Haw. Rev. Stat.*, § 377-1 to 18; *Rev. Stat. of N. J.*, § 34:13A-1 to 13; *Laws of Puerto Rico*, Title 29, § 62-76; *Wisc. Stat. Ann.*, § 111.01-.09.

7. These states are Arkansas, Colorado, Indiana, Louisiana, Missouri, Nevada, New York, North Dakota, Pennsylvania, Texas, Utah and Washington. *Ark. Stat. Ann.*, § 41-4124; *Colo. Rev. Stat.*, § 8-2-101 to 103; *Burns Ind. Ann. Stat.*, § 35-15-3-1; *La. Rev. Stat.*, § 23.822; *Mo. Const. Art. I*, § 29; *Nev. Rev. Stat.*, § 614.090-110; *N. Y. Const. Art. I*, § 17(1938); *N. D. Rev. Code*, § 34-19-01; *Purdon's Pa. Stat. Ann.*, Title 43, § 191; *Vernon's Tex. Stat. Ann.*, Art. 5207a; *Utah Code Ann.*, § 34-2-1; *Rev. Code of Wash.*, § 49.36.010-030.

CONCLUSION.

On the basis of the foregoing, the American Farm Bureau Federation respectfully submits that this case presents a substantial federal question of significant interest to agricultural employers throughout this country and, for that reason, this Court should note Probable Jurisdiction.

Respectfully submitted,

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